1950, and 90% thereafter. (R. 774–777, 941–942, 1733, 1811–1812, 2825.) Pauline Ross, the office manager, owned the remaining 10% after 1950. (R. 769–770, 776, 943–944, 960–962, 1132, 1143.) Miss Ross never received any dividends on her stock (R. 951, 1132), but her salary was increased from $115 a week to $270 a week on the same day that she became a stockholder (R. 943, 1142–1143).[3]

During the period 1946 through 1954, several hundred thousand dollars were withdrawn from the corporation by the Keenans as "Sales Commissions" (Govt. Exs. 409–A, 410), and virtually all of the proceeds of these checks came, usually by circuitous routes, into the hands of Frank Keenan. The amounts thus credited on the corporation's books to Frank Keenan, his brothers (James and Mark Keenan) and his sons (George and Edward Keenan) were as follows (Govt. Ex. 409–A):

George Keenan	$108,035.35
Edward Keenan	26,324.01
Mark Keenan	174,522.84
James Keenan	104,887.81
Frank Keenan	36,448.30
Total	$450,218.31

George, Edward, Mark and James were not salesmen. George and Edward, both of whom were put on the corporate payroll at the age of 22, did only clerical work inside the office for nominal salaries

[3] Prior to December 1, 1950, Miss Ross' salary had increased gradually from $75 a week in 1945 to $115 a week in 1950. (R. 915, 943.)

and turned all of their "Sales Commissions" over to their father, Frank Keenan. (R. 857, 979, 998, 1735–1738, 1785, 2875–2876.)[4] Mark Keenan never obtained any orders for the corporation and came into the office only once or twice a week for a half hour or an hour to read the newspapers. (R. 794, 2641–2644.) During the entire period he had a full time job with the City of Chicago (R. 1176–1182). Mark kept only $9,000 or $10,000 of his "Sales Commissions" for his own use, turning the remainder over to Frank Keenan. (R. 100, 2584, 2586, 2636–2637, 2660.) James Keenan served as the ostensible head of the corporation at a salary of $200 a week between 1945 and 1950 (while Frank Keenan was an alderman of the City of Chicago)[5] and turned all of his "Sales Commissions" over to Frank Keenan. (R. 774–775, 911, 954–955, 1731, 1811–1812, 1815, 2332, 2936.)

These "sales commissions" were channeled to Frank Keenan through a series of intricate financial

[4] The "Sales Commissions" ostensibly paid to George, Edward, Mark and James Keenan were reported by them on their individual tax returns as though they had received the money. The corporation, however, paid their individual income taxes. For the years 1950 through 1952, the total income taxes paid by the five Keenans on an individual basis on the "commissions" purportedly received by them were $63,344.07 less than the tax which Frank Keenan would have had to pay had he reported all the "commissions" as his own income. (R. 951–952, 1937, 2011–2012, 2053–2058; Govt. Ex. 417). See *infra*, p. 11.

[5] An Illinois statute forbade municipal officers from doing business, directly or indirectly, with the City. (R. 513–514, 1812; 24 Smith-Hurd Illinois Annotated Statutes (Permanent ed.), Sec. 9—91.)

transactions. During the years 1947 through 1954, 59 checks totalling $112,223.65 were issued by the corporation to Mark, James, George or Edward, endorsed by the payee, and immediately turned over to Miss Ross, the office manager, who endorsed and cashed them. The currency was placed in the office safe or in Frank's safe deposit box at the bank, and was then turned over to Frank as he requested it, or was used to purchase cashier's checks for Frank. Frank got the entire $112,223.65, and did not report any of it as income on his tax returns. (R. 779–783, 790–829, 897–903, 1165–1166, 2993–2995.) In addition, there were 45 other corporate checks totalling $154,727.01, which were charged against the accounts of James, Mark, Edward or George Keenan on the corporate books, and which were disposed of as follows (R. 830–881, 994–996, 1084–1098, 1165–1169, 1380, 1381, 1937–1940; Govt. Ex. 410):

Number of Checks	*Disposition*	*Amount*
16	Deposited to Frank's personal bank accounts	$63,150.00
4	Used to purchase securities for Frank	23,972.99
6	Endorsed by payee and cashed by Frank's personal secretary	10,800.00
3	Deposited in the bank account of a California hotel (the Oaks Hotel) owned by Frank	15,000.00

Number of Checks	Disposition	Amount
16	Disposition uncertain. Checks were cashed but the proceeds could not be traced	$41,804.02
	Total of 45 checks	$154,727.01
	Add: 59 "double-endorsement" checks, all the proceeds of which were turned over to Frank	112,223.65
	Total of 104 checks analyzed	$266,950.66

In 1954, after the above facts had been unearthed by the Treasury agents, they interviewed the Keenans, all of whom claimed that the transfer of these "commission" monies to Frank merely represented loans to him, and that as a result Frank owed his sons and brothers large sums. (R. 93–94, 96, 100, 103, 106, 1732.) A few months later, however, on September 3, 1954, Frank filed a financial statement with a California bank, in which he certified that his *only* liability was an $84,000 mortgage on the Oaks Hotel, owed to a Mrs. Barrington. (R. 1430, 1438; Govt. Ex. 365.)

Other evidence also indicated that the sums were not loans to Frank. For example, although James testified at the trial that Frank owed him about $43,000 in 1950 and $120,000 in 1957, and Frank testified "I think I have almost every cent that Jim

Keenan has, at the present time" (R. 2936), James was borrowing from his bank between 1948 and 1954 sums ranging from $1,000 to $5,000, often putting up his car as security (R. 593–603, 2332). In 1951 James, upon buying land from Frank, paid him $23,000 and gave him a note for the balance. (R. 2001, 2331, 2869.) In 1955 Mark borrowed sums of $600 and $800 from a bank, although he testified at the trial that Frank has owed him $83,000 ever since 1953. (R. 562–565, 2584, 2586, 2660.) On October 4, 1951, George borrowed $100 from the corporation.[6] At that time the balance due him on the corporate books was $13,470.79. Nevertheless, weekly deductions of $5 or $10 were made from George's modest salary until the $100 loan was repaid in full on December 27, 1951. (R. 977–979.) In August, 1950, there was set up on Frank's personal books (maintained by his secretary) a new account entitled "Loans Payable—Securities." When his secretary would receive large sums of currency of which she did not know the source,[7] she would sometimes credit it to "Loans Payable—Securities" and sometimes not. (R. 1381–1383, 1386–1388, 1453–1468, 1520–1523, 1530–1531.) Frank was unable to tell his accountant how much he owed to each member of his family, and although the

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[6] One day earlier, on October 3, 1951, the corporation had issued a check to George for $1,750. It was endorsed by George and Frank's personal secretary and cashed. (R. 979.)

[7] On some occasions Miss Ross would send envelopes containing substantial amounts of currency to Frank Keenan's secretary who, on his instructions, would deposit it in his bank account or use it to buy cashier's checks for him. (R. 1400–1403, 1468–1469, 1472.)

accountant attempted on several occasions to allocate the "Loans Payable" and "Loans Payable—Securities" accounts, he was never able to do so except on an arbitrary basis. (R. 1570–1573, 1576–1577, 1584, 2172–2174, 2202–2203.)

THE SUBSTANTIVE COUNTS

Evidence to support the verdict against Frank Keenan on the substantive counts may be summarized as follows:

The counts alleging that Frank Keenan had wilfully attempted to evade his individual income taxes for 1950, 1951 and 1952 were proved by two separate methods: (a) specific items of unreported income, and (b) the net worth method.

(a) The Government proved that if the "Sales Commissions" ostensibly paid to Mark, James, George and Edward had been reported in full as income on Frank's tax returns, he would have owed the following amounts over and above the taxes reported by Frank and his brothers and sons attributable to the "Sales Commissions" (R. 2054–2058; Govt. Ex. 417):[5]

1950	$17,981.05
1951	35,158.28
1952	10,204.74
Total	$63,344.07

[5] See n. 4, *supra*, p. 7.

Frank Keenan admitted at the trial that he had used all the "Sales Commissions" given him by his brothers and sons for his own purposes. (R. 2993–2995.)

(b) The Government made a thorough investigation of the assets, liabilities, expenditures, possible sources of nontaxable funds, and other financial affairs of Frank Keenan and his wife, for the period beginning December 31, 1943, and ending December 31, 1952. (R. 1962–1964, 1978–1981, 2004–2006.) On the basis of increases in net worth and nondeductible expenditures, the true net income and tax, compared with the amounts reported on the returns, were as follows (R. 1967–1979, 2045–2048; Govt. Exs. 414, 416):

Year	Net Income		Income Tax	
	Reported	Corrected	Reported	Corrected
1950	$16,551.36	$53,973.98	$3,194.32	$19,612.96
1951	40,653.63	84,654.39	14,172.96	42,081.54
1952	18,911.09	49,024.88	4,814.22	20,840.42
Total	$76,116.08	$187,653.25	$22,181.50	$82,534.92

Frank Keenan testified at the trial that he had between $30,000 and $35,000 in undeposited cash at the end of 1949, but admitted that he had about the same amount throughout the years covered by the indictment and that it did not vary more than $5,000 from the end of one year to the end of another. (R. 2810, 2980.) Other "starting point" proof showed (1) the

combined net worth of Frank and Mrs. Keenan at the end of each year from 1943 to 1949; (2) that he had substantial liabilities at the end of 1943; and (3) that on the basis of the income tax return filing history of Frank and Mrs. Keenan since 1930, plus his salary from the City of Chicago during the years when it was not subject to federal income tax, they could not have accumulated a substantially greater starting point net worth than that shown in the Government's reconstruction. (R. 343–344, 1664–1671, 1963–1964, 1968.)

The counts alleging that Frank Keenan had wilfully attempted to evade the taxes of the corporation for the years 1950, 1951 and 1952, were proved mainly by evidence of the fraudulent deduction of the "Sales Commissions" (*supra*, pp. 5–11). The amounts by which corporate income and taxes were understated were as follows (R. 2030–2037, 2401–2402; Govt. Exs. 415, 415A):

Year	Net Income		Income and Excess Profits Taxes	
	Reported	Corrected	Reported	Corrected
1950	$36,803.05	$123,326.24	$10,707.28	$56,673.96
1951	32,709.97	116,596.01	11,100.31	70,318.07
1952	6,278.83	84,101.36	1,883.65	46,899.47
Total	$75,791.85	$323,933.61	$23,691.24	$173,891.50

ARGUMENT

1. Petitioner Frank Keenan attacks (Pet. 16–21) the accuracy of certain figures used in the Government's reconstruction of his net worth.* These specific challenges to the figures were not raised at the trial, are without substance, and raise only the factual question whether there was sufficient evidence to sustain the conviction—a question resolved against petitioner by the Court of Appeals after a careful review of the evidence.

Petitioner's contention rests upon the implied assumption that variations between his own books (transcribed by a Treasury agent in 1952, R. 1352–1357, and introduced into evidence as Government Exhibit 348) and the Government's reconstruction of his net worth (Govt. Ex. 414) must be resolved in his favor. But net worth cases almost invariably involve such variations; if the taxpayer's books accurately reflected his income, there would be no need to resort to the net worth method. By its verdict, the jury found that petitioner's books did not accurately reflect his income. The Court of Appeals held that this verdict was fully supported by the proof, which involved not only the net worth method, but also specific items of unreported income (see *supra*, pp. 11–13). Indeed, the defendants' own accountant

* Petitioners pose the question (Pet. 2–3, 16, 21) in terms of whether the court below was justified in holding that the Government's "good faith" excused alleged errors in the net worth figures. But the Court of Appeals made no such holding. Its reference to "good faith" (Pet. 16) was in response to petitioner's argument below—abandoned here—that the introduction of net worth proof was unnecessary.

witness testified that for the year 1950—the only year as to which petitioner makes specific challenges to the Government's figures [10]—he would have arrived at exactly the same unreported income shown by the Government (Govt. Ex. 414), if he had treated as income the "sales commissions" turned over to Frank Keenan by his brothers and sons (R. 3055–3056).

2. Petitioners contend (Pet. 21–23) that the deletion of seven overt acts from the conspiracy count (Supp. R. 18–21) was "an unauthorized and fatal amendment of the original Count 11 as returned by the Grand Jury" (Pet. 22). The deletion, however, was made at petitioners' urging and was, therefore, expressly authorized by Rule 7(d) of the Federal Rules of Criminal Procedure, which provides that "The court on motion of the defendant may strike surplusage from the indictment or information."

The conspiracy count as returned by the grand jury contained 21 overt acts. (R. 11–16.) Before trial, all defendants moved to strike the last seven overt acts as surplusage (R. 18, 21, 22, 25), later amending the motion to cover all 21 overt acts (R. 40–42). Judge LaBuy denied the motion. (R. 51–55.) At the trial,

[10] Even if petitioner's challenges were accepted, the effect would be only to reduce the understatement of his 1950 net income by $7,885.07 (increase in loans payable: $3,764.71; decrease in securities: $2,110.00; decrease in investment in the corporation: $2,010.36). See Pet. 18. The total amount by which petitioner understated his 1950 net income, however, was more than $37,000. See *supra*, p. 12. The Government is not required to establish the precise amount of unreported income; it is sufficient that there has been a substantial understatement. *Holland* v. *United States*, 348 U.S. 121, 138.

after the Government had rested, counsel for James Keenan argued that overt acts such as the last seven (R. 16) "are definitely not in furtherance of a conspiracy, but within the meaning of the *Grunewald* decision, and therefore they are not applicable, and they are barred by the statute of limitations * * *." (Involving the making of false statements during the Government's investigation, R. 2081–2082.) The Government then agreed that those overt acts should be withdrawn from the jury's consideration (R. 2082). The court inquired whether the defense attorneys would prefer to have the seven acts blocked out from the indictment or to have them left in and then have the jury instructed as to their deletion. Both sides agreed it would be better to delete them. (R. 3188–3189, 3190.)

In these circumstances, petitioners cannot now complain because the trial court followed their request and physically deleted the surplusage from the indictment. As the Notes of the Advisory Committee on the Rules pointed out (Note to Rule 7(d)), "By making such a motion [to strike surplusage], the defendant would, however, waive his rights" to urge that "an indictment may not be amended."

3. Petitioners challenge (Pet. 23–27) the sufficiency of the evidence on all counts, arguing that payment of "Sales Commissions" is not a crime and citing defense testimony that it was customary for Chicago printing firms to pay from 10% to 15% in sales commissions. The issue in the case, however, was not whether the purported commissions were reasonable in amount, but whether they were "sales commissions" or mere shams utilized in a tax evasion scheme.

See *United States* v. *Ragen*, 314 U.S. 513. The witnesses relied upon by petitioners testified on cross-examination that they were talking about salesmen who actually went out and brought in printing business. (R. 2219–2220, 2224–2226.) In the instant case the Government proved that even though Frank Keenan's brothers and sons were not salesmen, and did not bring in any business,[11] their accounts were credited with some $414,000 of purported "sales commissions" during a ten-year period, with corresponding charges to the "Sales Commissions" account; that the entire $414,000 was deducted as expenses on the corporation's book and tax returns; and that practically all of the money ostensibly paid to Mark, James, Edward and George Keenan was paid over, usually by a circuitous route, to Frank Keenan. (*Supra*, pp. 5–11.) In short, the evidence showed, as the court below held, that the "Sales Commissions" were "not legitimate payments for expenses actually incurred" but "merely a means of siphoning off unreported profits of the company for the personal benefit of Frank Keenan * * *" (Pet. 7a–8a); and that there "is abundant evidence in this record to support" the jury's rejection of "Frank's claims that [the 'Sales Commissions'] were loans" (Pet. 7a).

4. Petitioner Frank Keenan contends (Pet. 27–31) that his conviction under Counts I and V (relating to

[11] Although James Keenan claimed that he controlled the important National Railroad Adjustment Board account, it was obtained by the corporation on an annual bid basis with little or no competition. (R. 1190–1193, 1196, 1199–1201, 2242–2249.)

the 1950 tax returns of himself and the corporation) was barred by the statute of limitations. No such contention was made in the district court; indeed, it was expressly waived there (R. 22–26, 41–42, 2085–2086).[12] We submit that the Court of Appeals correctly held (Pet. 9a) that "as no objections were raised in the pleadings or upon the trial, the Government was not required to prove that the prosecution was not barred by the statute of limitations." The cases which petitioner cites as in conflict with the decision below (*Flemister* v. *United States*, 260 F. 2d 513 (C.A. 5), and *White* v. *United States*, 216 F. 2d 1 (C.A. 5)) are distinguishable, since in both of them the defendants raised the limitations point in the district court.

5. Petitioners attack (Pet. 31–34) the sufficiency of the overt acts set forth in the conspiracy count, primarily on the ground that some of them occurred more than six years prior to the return of the indictment. But the only requirement for conviction of conspiracy is that at least one overt act in furtherance thereof must have occurred within the statutory period. Since that requirement admittedly was here satisfied, it is immaterial that other overt acts took place outside the period, or that more overt acts were alleged than are necessary. Cf. *Braverman* v. *United*

[12] Petitioner's plea based on the statute of limitations related solely to Count XI (R. 22–26). Although petitioner contends that he amended this plea to cover the entire indictment, the amendment related only to "said count," *i.e.*, Count XI (R. 41–42). At the trial, petitioner stated that he was not raising any limitations issue with respect to the other counts (R. 2085–2086).

States, 317 U.S. 49, 53; *Capriola* v. *United States,* 61 F. 2d 5 (C.A. 7). Indeed, since Count XI alleged that the conspiracy had continued over a twelve-year period (from December, 1944 until April 30, 1957), it was hardly surprising that some of the overt acts alleged had taken place prior to April 30, 1951.

6. Petitioners state (Pet. 34–38) that they were prejudiced by three incidents of alleged misconduct by the prosecutor during the course of a seven-week trial: (a) the reading of an Illinois statute to the jury; (b) asking an allegedly prejudicial question while cross-examining James Keenan; and (c) suggesting, while cross-examining Frank Keenan, that he had evaded taxes in years prior to those covered by the indictment.

(a) The Illinois statute which prohibits municipal officers from doing business with the city (*supra* p. 7, n. 5) was highly relevant to the Government's case. It tended to show (1) why Frank Keenan transferred 80% of the corporation's stock to James in 1945; (2) that the stock did in fact belong to Frank at all times; (3) that Frank was in a position where he could not appear to be receiving income from the corporation; and hence (4) that the "Sales Commissions" being turned over to Frank were income, and not loans. (*Supra,* pp. 5–11; R. 774–775, 1812, 2948–2949.) There was evidence that the corporation was doing business with the city while Frank was still an alderman (R. 2348, 2349, 2945–2946), and was soliciting other business from the city during those years (R. 1845, 2571–2572).

(b) The purpose of the prosecutor's question about James Keenan's "sick" wife (Pet. 36) was to show that James was staying home with her, and was not travelling about the country on corporate business.[13] This was pertinent with respect to whether certain payments to James were legitimate corporate expenses.

(c) The prosecutor's questions to Frank Keenan about the income tax returns he filed in the 1930s and early 1940s were designed to demonstrate that the Government's reconstruction of his starting point net worth—which depended considerably upon his tax return filing history (*supra*, pp. 12–13)—was correct. It was defense counsel who raised a question with respect to these old returns (R. 2737–2738, 2780–2781, 2789–2793, 2808–2809), for the evident purpose of casting doubt on the starting point proof. The contention—first made on appeal—that when the prosecutor went into the matter on cross-examination (R. 2976–2980), he was intimating that Frank had "committed crimes other than those charged in the Indictment" (Pet. 38), is thus without substance.

7. Petitioners complain (Pet. 38–48) that they were prejudiced by the large amount of evidence introduced by the Government, because the jury could

[13] James Keenan claimed to have travelled extensively on behalf of the corporation in connection with the National Railroad Adjustment Board account. (See p. 17, n. 11, *supra*.) The Government proved, however, that of representatives of organizations accounting for 83% of the corporation's N.R.A.B. business, seven had never met James and two had seen him only in Chicago. (R. 1215, 1225–1226, 1231–1232, 1239–1242, 1267, 1271–1272, 1282, 1296, 1309–1312, 1336–1338, 1347, 1653, 2245–2249, 3035–3038.)

not "keep in mind the limitations and restrictions as to the exhibits introduced" (Pet. 43), particularly the persons against whom the various documents were admitted. But the large volume of proof was necessitated because of the intricate financial transactions through which petitioners had endeavored to conceal their tax fraud scheme. As the Court of Appeals pointed out (Pet. 12a), the defendants had been furnished with "verbatim copies" of statements which they made to Treasury agents, and they "had long known the Government would offer them in evidence as the making of each statement was spelled out in the indictment as an overt act. Nevertheless, no motion for a severance was made. In effect, defendants consented to a joint trial at which all defendants and all eleven counts would be tried together." In these circumstances, their belated claims of prejudice have no substance. Cf. *United States* v. *Haupt*, 136 F. 2d 661, 672 (C.A. 7). The cases upon which petitioners rely (Pet. 43–47) involved peculiar factual situations and highly incriminating statements; in the instant case, however, as the Court of Appeals noted (Pet. 12a), "the statements were not confessions but were exculpatory statements made during the life of the conspiracy."[14]

[14] Petitioners' contention (Pet. 48–49) that there was sufficient evidence to justify the trial court in submitting to the jury the question whether, when Mark Keenan testified before the grand jury, he was a "'putative' and 'targeted' defendant," and whether a statement which he gave to Treasury agents in 1957 was obtained by "trickery," raises only factual questions which the Court of Appeals correctly resolved against him.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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